United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7087

United States Court of Appeals

FOR THE SECOND CIRCUIT

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,
Plaintiff-Appellee,

against

INMOBILIARIA MELIA DE PUERTO RICO, INC.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

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Preliminary Statement

On January 22, 1976, after a hearing in the District Court (Motley, D.J.) at which it was found that the defendant had wilfully disobeyed prior orders of the District Court to provide or permit discovery, the defendant's amended answer was stricken and its counterclaims dismissed. In addition, judgment was entered in favor of the plaintiff on its claim that the defendant had breached a contract entered into by the parties whereby plaintiff was given the sole and exclusive right to obtain construction loans for the defendant.

Counterstatement of Issues Presented

Was it an abuse of discretion for the District Court to apply the sanctions provided in Rule 37 of the Federal Rules of Civil Procedure when defendant repeatedly failed to appear for its deposition and also failed to produce documents requested by plaintiff or, in lieu thereof, affidavits attesting to the nonexistence of such documents after the District Court, on a number of occasions, had ordered defendant to do so?

Was it an abuse of discretion for the District Court to deny defendant's motion for an order directing that its deposition by Pedro Fullana be located in Puerto Rico when the plaintiff had noticed the deposition to be held in New York and had shown why it should be held there, and the defendant had not shown any reason to change the location and was guilty of laches in making the motion?

Counterstatement of the Case

A. The Nature of the Case

This action arose out of a contract between the parties whereby the plaintiff was given the exclusive right to secure financing for the defendant's construction project. During the period in which the contract was in full force and effect, the defendant, through another broker, negotiated for and accepted a loan commitment from a lender earlier contacted by the plaintiff on defendant's behalf. On or about May 31, 1973, the plaintiff sued to recover the commission fee in the amount of $285,000 owed to it by the defendant pursuant to the contract and as a result of the defendant's action. By its amended answer, dated April 8, 1975, the defendant asserted counterclaims seeking damages in the amount of $1,500,000 for the delay that allegedly occurred as a result of the plaintiff's efforts in seeking the financing for the defendant. Plaintiff replied that any

delay was due entirely to the fault of the defendant in failing to supply information to the plaintiff for timely submission to a proposed lender.

1. *The Parties.*

Plaintiff provides individual, institutional, corporate and governmental clients with a diversified range of financial services in connection with securities, investment banking and other areas of financing. One aspect of plaintiff's activities has been the mortgage brokerage business.

Defendant is a Puerto Rican corporation organized for the purpose of constructing a condominium hotel, termed an Apartotel, in Puerto Rico. (EV 8, 14-15)* The three principal figures in the defendant's operations are Martin L. Cohen, Jack Berger and Pedro Fullana. Cohen, a resident of New York, owns or controls, directly or indirectly, approximately 50 percent of the defendant's stock and is a director and the president of the defendant. (EV 3, 9-10) Berger, also a New York resident, was a director and senior financial officer of the Melia Organization, a Spanish organization which owns and operates hotels and condominiums throughout the world and which owns approximately three-eighths of the stock of the defendant. (JA 63; EV 204-05) Finally, Pedro Fullana, a resident of Puerto Rico, controls approximately one-eighth of the stock of the defendant, is executive vice-president of the defendant and is in charge of its operations in Puerto Rico. (JA 56, 63, 244; EV 215, 452)

2. *The Contract.*

As a result of discussions between Berger and Fullana, on behalf of the defendant, and representatives of the plaintiff, the parties entered into the brokerage agreement,

*"EV" refers to the Exhibit Volume; "JA" refers to the Joint Appendix; "DB" refers to the Defendant-Appellant's Brief.

dated March 24, 1972, upon which this action is based. (JA 8-10; EV 26-29, 213-15) Pursuant to the terms of the contract, defendant appointed plaintiff its sole and exclusive agent to make applications on defendant's behalf for a stand-by and construction loan combination in the total amount of $18,000,000. The contract provided that the guarantors of the loan would be Pedro Fullana, Jose Melia, Sr., of the Melia Organization, and Basic Equities and Development Corporation ("Basic Equities"), a holding corporation controlled by Cohen with operating subsidiaries engaged in the real estate business in Puerto Rico. (JA 8; EV 4-6)

Defendant gave plaintiff the exclusive right to apply for loans on its behalf for a minimum period of 30 days from the date of plaintiff's acceptance of the contract (April 3, 1972) and its receipt of all necessary supporting data, with the period to be automatically extended unless and until terminated in writing after the initial 30-day period. (JA 8-9) Defendant further agreed to pay plaintiff a brokerage fee equal to 1½ percent of the amount of any loan commitment delivered to defendant, if such loan substantially conformed to the terms in the contract, and/or of any loan accepted by the defendant. (JA 9)

3. *Amendments of the Contract.*

Plaintiff immediately began to contact numerous potential lenders, including First Mortgage Investors Trust ("FMI"), The Chase Manhattan Bank, and Housing Investment Corporation ("HIC"), a Chase subsidiary and the ultimate source of the defendant's financing. (EV 391-93, 519-20, 522-23) After FMI expressed interest in providing the financing, Leonard Wilkes, head of the plaintiff's national mortgage department, sent Fullana two letters dated May 12, 1972. (EV 149-52) One was a proposed letter agreement between the parties to amend formally their contract in order to authorize plaintiff to negotiate

with FMI under the conditions upon which FMI had stated it would accept a loan application from the defendant. No changes were made either in the term or termination provisions of the contract or in the brokerage fee. The other letter was a cover letter to Fullana in which Wilkes expressed his concern about defendant's delay in executing a formal application to FMI. This delay was caused by the refusal of Basic Equities, Cohen's corporation, to remain as a guarantor on the loan, notwithstanding its agreement to that condition in the March 24, 1972 contract with plaintiff. (EV 40) After further negotiations between plaintiff and FMI, FMI agreed to make the loan with only Jose Melia, Sr. and Fullana as guarantors; Basic Equities would be released from any guarantee. This change was agreed to by the defendant, and the March 24, 1972 contract between the parties was amended by letter agreement dated May 22, 1972 to reflect this change in plaintiff's authorization. (JA 11-12)

On June 8, 1972, Wilkes, Cohen, Fullana and representatives of FMI met at FMI's office in Coral Gables, Florida at which time the defendant's formal application for a loan was to have been executed. (EV 411) At the meeting, however, Fullana refused to guarantee the loan and thereby reneged on the March 24, 1972 contract, as amended on May 22, 1972. As a result, the application could not be completed and the meeting was adjourned with the problem of presenting an adequate guarantee to be resolved by the defendant's principals. (EV 411-13, 510-11 confirmed by defendant at 43-44) After some further delay, the terms of the guarantee were amended whereby the loan would be secured by a lien on the property, by the defendant's stock, and by a $1,500,000 irrevocable letter of credit. Once again, the plaintiff's authorization was amended to reflect the change in conditions, and another letter agreement, dated June 26, 1972, was executed to amend the March 24, 1972

contract in this respect. (JA 13-14) Again, no changes were made either in the term or termination provisions of the contract or in the brokerage fee.

4. *Defendant's Failure to Produce Supporting Documentation.*

After resolution of the guarantee problem, the defendant submitted its formal application to FMI for a loan in the amount of $19,000,000 and requested that FMI process the loan toward final Trustee approval. (EV 515) This could not be done, however, because the defendant had not yet furnished sufficient documents for FMI to evaluate the application. On or about May 8, 1972, Wilkes had asked Berger to provide the defendant's marketing program and the sales performance and history of the Melia Organization, all of which, it was explained, were in Spain and would be provided upon their arrival from that country. (EV 396-99, 462)

The defendant provided some sales and marketing data which was forwarded to FMI by plaintiff on August 11, 1972, (EV 529-30) but the data, which was not properly substantiated, was unsatisfactory to FMI. By letter dated August 18, 1972, FMI requested that the defendant verify the claims made in the marketing report. (EV 531-32) This request was transmitted by Wilkes directly to Francisco Melia, Jr., a member of the Melia Organization in Spain, with a request for prompt action since the FMI trustees would soon be meeting. (EV 533)

By September 22, 1972, defendant still had not produced the requested information, and FMI was able to further process the loan application with only the partial data already in its possession. (EV 534) On September 25, 1972, Wilkes received the marketing report from the defendant and promptly transmitted it to FMI. Wilkes also arranged another meeting between FMI and the defendant. (EV 535-36)

5. *Defendant's Breach of the Contract.*

Shortly thereafter and before the meeting could take place, FMI informed the plaintiff that it could not accept the loan application from the defendant. (EV 537) On October 5, 1972, Wilkes met with Berger to inform him of the rejection and to suggest alternate loan sources, including The Chase Manhattan Bank which had recently expressed interest in the deal. (EV 430-31) At that time, Berger revealed that the defendant was already engaged in negotiations for the loan with HIC, the Chase subsidiary which Wilkes had previously contacted regarding the loan. (EV 431-34)

The October 5, 1975 meeting with Berger was the first indication the plaintiff received that the defendant, in violation of the terms of its contract with the plaintiff, was seeking a loan without the assistance of the plaintiff. (EV 433) However, even by its own admission, the defendant was using the services of another broker at least as early as August or September 1972 and had been negotiating with HIC since at least September 1972. (EV 87, 89-94)

After learning of the negotiations with HIC, Wilkes indicated that the plaintiff would like to help with the HIC financing and to expedite the closing of the deal; he also reminded the defendant that, in any event, plaintiff would be entitled to a commission pursuant to the March 24, 1972 contract, as amended, since the defendant was still under active authorization to it. (EV 517) By letter dated November 1, 1972, the defendant rejected the plaintiff's offer of assistance as well as its claim for a brokerage fee. (EV 521) Consequently, the plaintiff did nothing further to secure financing for the defendant, who was acting through another broker. (JA 57; EV 91, 93-94)

It was later learned that on October 31, 1972, pursuant to prior oral negotiations and agreement between the defendant and HIC, a loan and pledge agreement was executed by the defendant and HIC, supplemented by another agreement dated November 13, 1972. (EV 119-48, 315-53) The loan from HIC was guaranteed by Fullana, Melia and Basic Equities, the three original guarantors of the FM1 loan prior to their reneging on the guarantee in that deal. (EV 146-48, 325-30) Although the defendant had not terminated its contract with plaintiff, the defendant secured this loan through the services of an independent broker, Juan J. Otero, who was paid a commission of $170,000. (JA 57; EV 93-97, 99, 162, 167-69; DB 6-7)

After the loan agreement with HIC was executed, the defendant again refused payment of the commission and, after discussions failed to resolve the dispute, plaintiff commenced this action. (JA 66; EV 521)

B. Proceedings in the District Court

This action was commenced in the District Court on May 31, 1973, and the defendant answered on July 30, 1973. (JA 5-16)

1. *Plaintiff's First Motion for Sanctions and the District Court's March 5, 1974 Order.*

On September 25, 1973, plaintiff noticed the depositions of the defendant by Cohen, Berger and Fullana for November 1, 1973 in New York, and also served notice that certain documents be produced by the defendant by October 25, 1973. (JA 20-22, 24-25) The requested documents included, *inter alia,* all documents which reflect, refer or relate to any agreement, understanding or communication

occurring from January 1, 1971 to the date of the notice between the defendant and any other person in connection with any financing or proposed financing of the defendant's Apartotel project. A similar request was made for documents concerning communications between the defendant and any broker other than plaintiff and for documents concerning the loan or any proposed loan from HIC or from The Chase Manhattan Bank. (JA 20-22)

As of the date set for production, however, the defendant had produced no documents. On October 29, 1973, attorneys for the parties agreed that the documents would be produced "as soon as possible, hopefully prior to November 16" and that the depositions of Cohen and Berger would be taken on December 4, 1973. In addition, the deposition of plaintiff by Wilkes, the only discovery the defendant has ever sought in this action, was rescheduled for November 21, 1973. (JA 39)

Wilkes' deposition proceeded as scheduled on November 21, 1973. At that time, plaintiff's attorney again requested from Richard F. Horowitz, Esq., defendant's attorney, the production of defendant's documents, few of which had yet been produced:

> "MR. PARSONS: . . . [W]e have asked for certain documents from the defendants and pursuant to stipulation of the parties, the defendant was going to attempt to produce those documents last Friday.
>
> All that has been produced thus far by the defendant were some documents which were produced today, which do not include a number of the documents requested, such as the document relating to the transaction with HIC, and indeed, what has been produced are basically the attorney's files here and do not purport to be anything like the full compliance with the request.

> We note that, and we are willing to continue the deposition now even so, and I don't think we have to make a long list of what you did produce.
>
> MR. HOROWITZ: I'll concede for the record, although I have produced some documents today, there is no question that I have not produced all documents that you have requested. However, I have produced all of them that I do have. I don't have the remainder of them.
>
> MR. PARSONS: You are making efforts, and as far as you know, your clients have a good many more that are called for?
>
> MR. HOROWITZ: As far as I know, yes." (EV 356-57)

By December 3, 1973, even though Mr. Horowitz had conceded that additional documents existed which were requested by plaintiff, no further documents had been produced and, in response to a telephone request, Mr. Horowitz informed plaintiff's attorneys that he was still unable to comply with the production request. In addition, he stated that neither Cohen nor Berger would appear, as previously scheduled, for their depositions the next day and, in fact, neither could attend depositions at all during the month of December 1973, and the depositions could not be held until the end of January 1974 at the earliest. (JA 31-32, 41) Mr. Horowitz was informed that a motion to compel discovery would be forthcoming unless documents were produced and the depositions rescheduled at earlier times.

Neither event occurred and, on December 18, 1973, plaintiff served its first motion for an order for sanctions pursuant to Fed. R. Civ. P. 37. (JA 28-39) The plaintiff

moved for an order directing that the defendant's answer be stricken and that judgment by default be entered for plaintiff or, in the alternative, that the defendant be compelled to proceed with discovery pursuant to Rule 37(a).

In response to plaintiff's motion, defendant filed an affidavit by Mr. Horowitz in which he stated:

> "Defendant has at no time questioned the fact that it must produce for depositions its officers, directors and managing agents with knowledge of the facts involved herein. Defendant has also never questioned the propriety of plaintiff's notice for production of documents.
>
> The only question between the parties regards the dates of compliance with these discovery requests.
>
> * * *
>
> Defendant has no objection to the Court fixing dates for the depositions of its officers, directors and/or managing agents at the very end of January or at any time thereafter. We will also produce the remainder of the documents requested by plaintiff in late January or early February." (JA 40-41)

After plaintiff informed the District Court that informal efforts to resolve the issues raised by the motion were unsuccessful due to Mr. Horowitz's difficulties in communicating with his clients (JA 26-27), the Court referred the motion to Magistrate Jacobs for assignment, and it was then assigned to Magistrate Schreiber for a hearing and report. (JA 43) Pursuant to Magistrate Schreiber's suggestion, on February 22, 1974, the parties entered into a stipulation which included a discovery schedule for depositions and document production, subject to the District Court's approval. (JA 44-45) The stipulation provided that all future pretrial discovery proceedings would be referred to Magistrate Schreiber for supervision; that the documents sought by the plaintiff's pending request for

document production would be produced on or before February 26, 1974; that the Cohen and Berger depositions would be held at plaintiff's attorneys' office on February 28, 1974 and March 5, 1974, respectively; and that the Fullana deposition would be deferred *sine die*. (JA 44-45)

Judge Motley modified the stipulation to schedule the Fullana deposition for April 17, 1974, rather than allowing it to be deferred *sine die*.* As modified, the discovery schedule became the District Court's order, dated February 26, 1974 and filed on March 5, 1974 (the "March 5, 1974 order"). Judge Motley's supervision over the discovery schedule indicated to the defendant that the action was one in which discovery was to proceed expeditiously; it further indicated that, notwithstanding the referral of discovery proceedings to a magistrate for supervision, the District Court had not given the magistrate a carte blanche and that the case was one in which the District Court was taking an active interest.

2. *The Cohen and Berger Depositions.*

The Cohen and Berger depositions were held on the scheduled dates, but, as of February 26, 1974, only a few additional documents were produced by defendant. Although the defendant is engaged in the construction of a multimillion dollar Apartotel in Puerto Rico, is headquartered in Puerto Rico, and has its principals located in Puerto Rico, New York, and Spain, it produced *no* correspondence among those people concerning any aspect of the financing of that project, *no* agreement with the broker who eventually arranged the financing (although he was paid

* Defendant has included in the Joint Appendix only the stipulation as presented to, but not as modified by, Judge Motley, and refers to that unmodified stipulation in its brief. (JA 44-45; DB 9) The District Court's order including Judge Motley's modification is part of the record on appeal in this case (JA 2) and a copy is included in the Supplementary Appendix in this Brief.

$170,000 for his efforts), *no* minutes of its board of directors' meetings at which the financing of the Apartotel was discussed or approved, and none of the other documentation one would expect of such a major transaction. The defendant's bad faith in not producing any such documents was evidenced by Cohen's testimony that Fullana's files had not yet been searched and Berger's testimony that his own files had never been examined. (EV 12, 258-59)

As it became apparent during the course of the depositions that the defendant had made little effort whatsoever to comply with the plaintiff's document requests and the District Court's March 5, 1974 order, and that additional documents called for by plaintiff's notice did indeed exist and had not yet been produced, the defendant was again requested to make the necessary searches and to produce the requested documents. In addition, Cohen was specifically asked to provide relevant minutes of board of directors' meetings and his own appointment books for the years 1971 and 1972; and Berger, as chief financial officer of the Melia Organization, was asked to produce any written agreements entered into with brokers other than plaintiff within the past few years. (EV 12-14, 81-82, 97, 206)

Also during those depositions—and contrary to the defendant's assertion, made for the first time in its brief (DB 10, 17, 19)—the vital importance of Fullana to the defendant's operations and, consequently, of his deposition to the plaintiff, became readily apparent. Cohen's and Berger's denials of knowledge in certain key areas belie defendant's assertion, also made for the first time in its brief, that the Fullana deposition would have been repetitious. (DB 10, 19) Thus, during their depositions, Cohen and Berger testified that:

Cohen deposition

1. Fullana initiated the discussions concerning the construction of an Apartotel; (EV 6-7)

2. Fullana and the Melia Organization were the incorporators of the defendant; (EV 8)

3. Fullana has the minutes of the board of directors' meetings; (EV 12)

4. Fullana was in the "finance type—mortgage type business" and "instituted most of the attempts at getting financing;" (EV 16)

5. "[T]he ultimate financing was the result of Mr. Fullana's efforts;" (EV 16-17)

6. Cohen doesn't know whether Fullana ever entered into a written agreement with any broker other than the plaintiff; (EV 19-20)

7. Fullana contacted HIC, the ultimate source of defendant's financing, and conducted negotiations with HIC; (EV 22, 89)

8. Fullana and Berger decided to approach plaintiff and made the initial contact; (EV 22)

9. Cohen had no contact with Otero, the broker in Puerto Rico; only Fullana and Alvarez, a Cohen associate in Puerto Rico, dealt with Otero; (EV 101)

10. Fullana executed the agreement with HIC on behalf of the defendant and was a guarantor of the loan; (EV 12, 146-48)

Berger deposition

11. Fullana was "masterminding" the defendant's operations in Puerto Rico and dealt with the plaintiff; Berger had no independent knowledge of the Apartotel; (EV 215)

12. The Melia Organization was "putting [its] ball into Mr. Cohen's and Mr. Fullana's hands and whatever their concensus [sic] was we, unless—we went along with;" (EV 248)

13. As time went on, "Mr. Cohen and Mr. Fullana became increasingly more active in the negotiations

and [Berger] became increasingly less active, so that from sometime in May [1972] on [Berger] really for all intents and purposes was on the outside looking in;" (EV 275-76) and

14. Fullana executed the supplemental agreement with HIC on behalf of defendant. (EV 315-19)

Cohen's and Berger's testimony confirmed Wilkes' testimony concerning Fullana's importance, including Wilkes' testimony about his meeting with Fullana in Puerto Rico; Fullana's attendance at a meeting in New York when the contract between the parties was delivered for signing; and Fullana's meeting with Cohen, FMI representatives and the plaintiff in Coral Gables, Florida at which Fullana reneged on his agreement to be a guarantor of the loan with the result that the formal application for an FMI loan could not yet be executed. (EV 362-63, 383, 411-12)

3. *Defendant's Belated Motion to Change the Location of the Fullana Deposition.*

By April 8, 1974, none of the requested documents had been produced and, in a letter of that same date, plaintiff's attorneys reminded Mr. Horowitz of his client's failure to produce and of the Fullana deposition scheduled by court order for April 17th. (JA 168) On April 12, 1974, more than six months after the deposition had been noticed for New York, more than one month after the District Court's order and just five days before the deposition was to have occurred, defendant served motion papers seeking an order directing that the Fullana deposition be held in Puerto Rico rather than in New York. Defendant also sought an order allowing it to amend its answer to include counterclaims and transferring the action to the District of Puerto Rico. (JA 46-58)

The defendant failed to include with its motion any affidavit by Fullana showing the burden, if any, upon him if

he had to travel to New York for his deposition.* Aside from a portion of its memorandum of law, the defendant's only references to the motion to transfer the deposition were in the notice of motion itself and the following sentence in Mr. Horowitz's affidavit:

> "In the event defendant's motion for a transfer is not granted, we request that the deposition of defendant's principal, Mr. Fullana, which plaintiff has noticed for New York City, take place at the United States Courthouse in Puerto Rico." (JA 53)

The timing of the motion and defendant's scant treatment of the motion to change the location of the deposition indicate that the motion was merely a device to further delay the deposition. Although defendant did not seek a stay of the Fullana deposition, as it should have done if it did not intend to appear on April 17th, the deposition was not held as ordered by the District Court.

4. *The November 11, 1974 Order.*

Pending resolution of the question concerning the location of the Fullana deposition, plaintiff continued to seek production of the documents requested earlier. Yet, notwithstanding its failure to seek a protective order to excuse it from such production, the defendant produced no additional documents. By letter dated June 26, 1974, the plaintiff again requested production of the documents and reminded the defendant that its pending motion concerning the deposition did not excuse it from document production. (JA 169)

By August 1974, nearly one year had passed since plaintiff had made its original request for documents and virtu-

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* The record reveals that Fullana made frequent trips to New York and that it would not have been a burden for Fullana to appear for his deposition in New York. For example, at his deposition, Berger testified: "[Fullana] used to come up here [New York] for very abbreviated trips and he was very apprehensive about catching the evening plane back to Puerto Rico. . . ." (EV 268)

ally all that defendant had produced was correspondence between the parties. On August 16, 1974, in a telephone conversation with Mr. Horowitz, plaintiff's attorneys again raised the issue of documents and were informed that both Mr. Horowitz and his clients had been away but that he would attempt to have a response shortly. (JA 148) Finally, in a carefully-worded letter dated October 21, 1974, Mr. Horowitz responded:

> "I write to confirm that we have no further documents to produce. You made specific inquiry as to whether Mr. Berger has any additional documents. Mr. Berger has indicated to me in writing that he does not." (JA 170)

Note that Mr. Horowitz only confirmed that neither his firm nor Berger had any documents to produce. He said nothing about whether Cohen or Fullana or any other officers or employees of the corporate defendant had documents. Neither Fullana nor Cohen produced documents or credibly denied their existence.

Defendant's response caused plaintiff to request a conference with Magistrate Schreiber, which was held on November 6, 1974. After the conference, Magistrate Schreiber issued a discovery order, dated November 8, 1974 and filed on November 11, 1974 (the "November 11, 1974 order"), in which he found:

> "Orders having been filed by this Court on March 5, 1974, and September 11, 1974, directing, *inter alia*, that the documents whose production was sought by plaintiff's Request for Production dated September 25, 1973 be produced on or before February 26, 1974; that further discovery matters in this action be referred to the undersigned; and that plaintiff's motion be dismissed as moot; and
>
> Counsel for plaintiff having advised the Court by letter dated October 22, 1974, of defendant's continuing failure to produce documents called for by plain-

tiff's Request and required to be produced by this Court's previous order; and

This matter having come on for a hearing on November 6, 1974, and counsel for both parties having been heard, and it appearing that defendant has failed to comply with this Court's Order of March 5, 1974 insofar as that Order directed the production of documents and that counsel for defendant has made no objection to plaintiff's Request for Production and has informed the Court of his inability to obtain the required documents from defendant; Now It Is

Ordered that those documents called for by plaintiff's Request for Production dated September 25, 1973, including those documents specifically requested during the deposition of defendant held on February 28 and March 5, 1974, be produced on or before December 15, 1974; and it is further

Ordered that, failing said production, it is the recommendation of the undersigned that defendant's answer be stricken and judgment be entered for plaintiff." (JA 171-72)

Thus, more than eight months after the District Court's first order, the defendant was given yet another chance to produce documents, while being put on notice that its failure to produce the requested documents would not be countenanced by the District Court and that a default judgment was a very real possibility in this action.

In light of these events, defendant's assertion that the District Court's March 5, 1974 order enabled the plaintiff "to continue to press various of its discovery demands" is truly extraordinary. (DB 11) And continuing, defendant alleges there had not been "in fact, any substantial, noncompliance with plaintiff's document production requests. ... Plaintiff's attorneys attempted thereafter to impose their own, Americanized view of proper record keeping on defendant." (DB 11-12) Of course, in his November 11, 1974

order, Magistrate Schreiber found otherwise. Furthermore, the defendant does not explain what an "Americanized view of proper record keeping" is, nor how the standard for the defendant, a Puerto Rican corporation in which residents of New York are heavily involved, differs from that for any other American corporation.

5. *The December 18, 1974 Order.*

On December 16, 1974, defendant produced three envelopes filled entirely with Cohen's personal and business travel and telephone bills and receipts, predominantly addressed to International Stretch Products, Inc., a Cohen family corporation. (JA 149; EV 3) Included in the envelopes was also correspondence between Cohen and certain travel companies concerning disputed bills. Plaintiff was advised that Berger had no documents to produce, although Berger had testified during his deposition that Melia files continued to exist and were in his possession, and that the defendant had complied fully with all document requests. (JA 149; EV 258-59) Yet, except for the Cohen travel and telephone records, defendant had produced fewer than thirty documents, the great majority of which was correspondence between the plaintiff and the defendant. And still, no documents from Fullana had been produced other than a few produced from Puerto Rico during the Berger deposition. (*See* EV 301)

Except for Cohen's travel and telephone records, every document produced by the defendant is included as an exhibit to either the Berger or Cohen deposition and is reprinted in the Exhibit Volume submitted to this Court, although not all the documents reprinted there were produced by the defendant. In fact, the only documents produced by the defendant, other than correspondence or agreements with plaintiff, were the HIC loan agreement; the checks and promissory notes given to Otero; and a loan application to FMI, which was already in plaintiff's possession and was included as a Wilkes deposition exhibit. (EV 164, 515)

The defendant's repeated failure to produce documents caused the plaintiff to request yet another conference with Magistrate Schreiber. On December 18, 1974, a discovery conference was held, and the above circumstances were cited to Magistrate Schreiber who directed Mr. Horowitz to supply affidavits by the defendant's principals indicating that plaintiff's document requests had been complied with fully (the "December 18, 1974 order"). (JA 150, 192) These affidavits have never been produced, nor has the defendant produced any additional documents since the production on December 16, 1974 of Cohen's travel and telephone records.

6. *Plaintiff's Second Motion For Sanctions.*

By an order filed March 31, 1975, the District Court denied defendant's motion to transfer the deposition to Puerto Rico, leaving in full effect its March 5, 1974 order requiring the appearance of Fullana for his deposition. (JA 127-31) For a second time, the defendant was now on notice that it would be required to appear for its deposition by Fullana, and that it was compelled to produce Fullana as quickly as possible.

Yet efforts since then to reschedule the Fullana deposition have been fruitless. Mr. Horowitz and plaintiff's attorneys had agreed that the deposition would be held on April 23, 1975, but on April 22, 1975, Mr. Horowitz informed plaintiff's attorneys that Fullana would not appear. (JA 150) Still trying to resolve the problem without seeking yet another court order, plaintiff's attorneys provided Mr. Horowitz with a number of possible dates for the deposition. Mr. Horowitz subsequently indicated he had been unable to contact Fullana, and the deposition has never been held. (JA 150-51)

It soon became clear that the defendant's failure to obey court orders was not the fault of its counsel. Recognizing that defendant was in serious default because of its

failure to cooperate with its own counsel as well as with the Court, defendant's attorneys served their motion, dated June 3, 1975, for leave to withdraw as counsel of record. (JA 137-41) Mr. Horowitz acknowledged that "significant additional discovery is required before the matter will be ready for trial", but stated:

> "The reason we seek permission to withdraw as counsel for defendant is that, due to circumstances beyond our control, we have been unable to obtain the necessary cooperation from the client that is required for us to do a professional and competent job of representing the defendant in this case. The situation has reached a point where we are unable to intelligently discuss with counsel for plaintiff a proposal that they have made with respect to settlement of this matter and we are unable to commit our client to deposition dates as requested by counsel for plaintiff." (JA 140)

Significantly, Mr. Horowitz did not state that he had been unable to communicate with his client to advise it of its perilous situation or to request that it appear for its deposition or produce documents or affidavits in compliance with the District Court's previous orders. Also significant is the defendant's failure to oppose, or even comment upon, its counsel's motion to withdraw.

On June 13, 1975, plaintiff opposed the motion for leave to withdraw on the grounds that the relief sought would subject plaintiff to further delay; the situation was attributable entirely to defendant, not to its counsel; and there was no evidence that the situation would improve if new counsel were retained. (JA 151-52) Plaintiff also cross-moved for imposition of Rule 37 sanctions for the defendant's continuing failure to appear for its deposition and produce documents or affidavits in lieu thereof. Once again, plaintiff moved for an order striking the answer, dismiss-

ing the counterclaims, entering judgment by default and awarding reasonable expenses, including attorneys' fees, incurred by reason of defendant's conduct. (JA 142-72)

By this time, the defendant had been in default with respect to the District Court's order of March 5, 1974 requiring the appearance of Fullana for his deposition for more than fifteen months, and more than two months had passed since the March 31, 1975 denial of its motion to change the location of the deposition, which reinforced the prior order and required the prompt appearance of Fullana. The defendant had also failed to produce documents as required by the District Court's orders of March 5, 1974; November 11, 1974; and December 18, 1974; as well as the affidavits required by the last of these orders.

On September 3, 1975, the motions were referred by the District Court to Magistrate Schreiber for a hearing and report. By letter dated October 3, 1975, Judge Motley informed the parties that all pre-trial procedures were to be completed by December 1, 1975, with a trial date scheduled for sometime after April 1, 1976, and that her Honor would decide any substantive motions. (JA 179-81) This was still another warning that defendant's recalcitrance could not last forever without sanctions being imposed. Still the defendant did nothing to comply with the District Court's prior discovery orders as it was required to do in order for plaintiff to complete its discovery before the deadline set by Judge Motley.

In reviewing the motions at a conference on December 1, 1975, Magistrate Schreiber did not then favor immediate imposition of sanctions, but instead favored a "last-chance" discovery schedule and said he would make such a recommendation to the Court. He also stated that he would recommend that defense counsel be permitted to withdraw only if new counsel were immediately substituted. As he had done on previous occasions, Magistrate Schreiber

requested that counsel for plaintiff draft a proposed order for presentation to the Court consistent with his proposed recommendations. The recommended order, as forwarded by Magistrate Schreiber to Judge Motley, included findings that the defendant had failed to comply with court orders requiring the production of documents or affidavits in lieu thereof and the appearance of defendant for its deposition by Fullana; the proposed order also included dates for the deposition and document production and for completion of discovery related to the counterclaims. (JA 191-93)

This submission of a proposed order pursuant to Magistrate Schreiber's request was not a waiver; the plaintiff's position remained clearly stated in its original motion papers which were submitted for the District Court's consideration along with the Magistrate's recommendation. Consistent with the spirit of Fed. R. Civ. P. 46, which makes repeated formal exceptions unnecessary, there was no need for plaintiff to submit yet additional papers for the record merely to restate what was already in its pending motion, and at no time did plaintiff suggest that it no longer sought a default judgment. In view of Judge Motley's continued active interest in the case, her prior refusal, where necessary, to accept without modification the recommendation of Magistrate Schreiber, and Magistrate Schreiber's recommendation concerning default in his November 11, 1974 order, the possibility that a default judgment would yet be entered was certainly a real one.

Nor can plaintiff's actions subsequent to the submission of the recommended order be viewed as inconsistent with its cross-motion for sanctions. Conscious of the Court's October 3, 1975 order, plaintiff was merely seeking to avail itself of every opportunity for discovery in the event its motion for a default judgment was not granted by Judge Motley.

7. *The Default Judgment.*

On January 12, 1976, Judge Motley rejected Magistrate Schreiber's proposed order and, upon the record before her, including plaintiff's cross-motion for sanctions, granted the cross-motion and ordered the entry of a default judgment. (JA 173*) Defendant then served a motion to vacate the order of January 12, 1976 and for entry of the order recommended by Magistrate Schreiber. (JA 194-211) A hearing was held before the District Court on January 21, 1976 at which Judge Motley denied the defendant's motion.

At the hearing, the defendant not only failed to offer any excuses for its contumacious behavior, but also explicitly denied that any such excuses would be forthcoming:

> "THE COURT: Let me ask you this: What accounts for your client's failure to appear previously for his deposition, prior to the Magistrate's proposed order —that is, as to Mr. Fullana? What accounts for his failure to appear for more than a year? I gather he was notified sometime in December or September—
>
> MR. HOROWITZ: I made a motion to withdraw as counsel in this case, and the reason I made that motion was that I had not been getting cooperation from my client, especially from Mr. Fullana.
>
> I don't think, in view of the confidence of attorney-client, that I should comment any further than I have in the motion papers.
>
> THE COURT: The evidence is that your client wilfully failed to appear for the taking of his deposition, and I am trying to find the date now when he was first notified—September 25, 1973. . . .
>
> * * *
>
> MR. HOROWITZ: Your Honor, I am not here to attempt to justify Mr. Fullana's failure to appear

* The copy of this order included in the Joint Appendix (JA 173) has not been reproduced legibly and, therefore, a copy is included in the Supplementary Appendix in this Brief.

between March of 1975 and the date of the conference before the Magistrate.

THE COURT: We are here because I am concerned with it. If you don't want to justify it, you don't have to, but that is why we are here, to determine whether a default judgment ought to be entered against your client, and, as far as I can see, the record is clear that your client wilfully failed to appear for his deposition, and that is why a default judgment is going to be entered against him, notwithstanding the recommendation of the Magistrate, because I disagree with it, that he is entitled to a second chance." (JA 228-31)

The excuse now offered by defendant in its brief to explain its failure to produce affidavits in lieu of documents —*i.e.*, that at the time of the hearing before Judge Motley "defendant's attorney was deflected from producing the affidavits of full compliance with document production, which, as he noted, he was otherwise prepared to file immediately" (DB 14)—ignores the full extent of the defendant's default. The production of those affidavits was ordered on December 18, 1974;* the hearing was on January 21, 1976, well over one year later.

It also fails to explain why the affidavits have not yet been produced. Berger and Cohen are both New York residents and could easily have produced affidavits at any time. The record shows that Fullana has been in New York on at least one occasion since the date of the hearing. When it became necessary for defendant to substitute counsel

*Although defendant's attorney refers in the hearing transcript to January 15, 1976 (JA 223), the date on which the affidavits would have again been required pursuant to Magistrate Schreiber's recommended order of December 9, 1975, in fact, defendant was in default since December 18, 1974 in supplying those affidavits. Thus, defendant is simply wrong when it states that the affidavits were not due until January 15, 1976. (DB 15)

after the judgment was entered, the defendant produced an affidavit by Fullana, sworn to by him on February 3, 1976, in New York, according to the notary's stamp on the affidavit. (JA 244-45) Under these circumstances, absent bad faith and wilfulness, the failure to produce the affidavits concerning document production is truly inexplicable.

At the hearing, Judge Motley reached the same conclusion and stated:

> "[T]he record is extensive and clear that your client wilfully disobeyed the orders of the Court." (JA 235)

On January 22, 1976, the District Court's order and a default judgment were filed. (JA 238-40) The order cited Magistrate Schreiber's recommendation of November 11, 1974 that defendant's answer be stricken and judgment be entered for plaintiff if defendant failed to produce documents. The District Court found that defendant, without any justifiable reason, had wilfully failed to comply with the Court's discovery orders and that such failure had not been due to an inability to comply. The Court also awarded plaintiff reasonable expenses, including attorneys' fees, in the amount of $3,743.50, incurred by defendant's unjustified failure to comply with the orders of the Court. (JA 240) That award has not been challenged by the defendant in its brief and, accordingly, plaintiff does not discuss that award in this brief, although it was clearly mandated by Fed. R. Civ. P. 37(b)(2).

ARGUMENT

POINT I

It Was Not an Abuse of Discretion for the District Court to Impose Sanctions Pursuant to Rule 37 After Defendant's Continued Wilful Failure to Comply With the Court's Orders

Rule 37(b)(2) of the Federal Rules of Civil Procedure provides in part:

> *"Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

The trial court is vested with broad discretion in choosing the appropriate sanction under Rule 37. *DiGregorio* v. *First Rediscount Corporation,* 506 F.2d 781, 788 (3d Cir.

1974); *Flaks* v. *Koegel,* 504 F.2d 702, 707 (2d Cir. 1974); *Diaz* v. *Southern Drilling Corp.,* 427 F.2d 1118, 1126 (5th Cir. 1970); *Diapulse Corporation of America* v. *Curtis Publishing Company,* 374 F.2d 442 (2d Cir. 1967); *Trans World Airlines, Inc.* v. *Hughes,* 332 F.2d 602, 614 (2d Cir. 1964), *rev'd on other grounds,* 409 U.S. 363 (1973); *Gill* v. *Stolow,* 240 F.2d 669, 670 (2d Cir. 1957).

As this Court recognized in *Gill* v. *Stolow, supra:*

> "The proper disciplining of a party under circumstances of default is one of those necessary, but troublesome, questions which usually must be left to the control of the trial judge in the course of his administration of his court." 240 F.2d at 670.

Moreover, the severity of the default sanctions should not dissuade the courts from applying them when the imposition of a lesser sanction would be overly lenient and inadequately protect discovery. Applying this principle in *Trans World Airlines, Inc.* v. *Hughes, supra,* this Court stated:

> "[W]here one party has acted in willful and deliberate disregard of reasonable and necessary court orders and the efficient administration of justice, the application of even so stringent a sanction is fully justified and should not be disturbed." 332 F.2d at 614.

Similarly, in *Diaz* v. *Southern Drilling Corp., supra,* adopting the reasoning of Professor Wright, the court stated:

> "'[W]ithout adequate sanctions, the procedure for discovery would be ineffectual. Under Rule 37 a party who seeks to evade or thwart a full and candid discovery incurs the risk of serious consequences. * * *' C. Wright, Federal Courts § 90 (1963). While it is true that the courts should impose sanctions no more drastic than those actually required to protect the rights of other parties, the language of Rule

> 37(d) makes clear that the application of sanctions is entrusted to the discretion of the trial judge, and over-leniency is to be avoided where it results in inadequate protection of discovery." 427 F.2d at 1126.

Thus, where a party is forced continually to invoke the court's aid to obtain discovery, and even then is frustrated by its adversary, the courts have not hesitated to apply the Rule 37 sanctions, including the dismissal of complaints and counterclaims and the entry of default judgments. *E.g., DiGregorio* v. *First Rediscount Corporation, supra; Diaz* v. *Southern Drilling Corp., supra; Jones* v. *Uris Sales Corporation,* 373 F.2d 644 (2d Cir. 1967); *Seaboard Distributing Co.* v. *Cott Corp.,* 20 Fed. Rules Serv. 2d 37b.246 (D. Mass. 1975). And the exercise of that discretion is reversible only upon a showing of an abuse of discretion. *Teamsters Local 251* v. *Town Line Sand & Gravel, Inc.,* 511 F.2d 1198 (1st Cir. 1975); *Flaks* v. *Koegel, supra; Theodoropoulos* v. *Thompson-Starrett Company,* 418 F.2d 350 (2d Cir. 1969), *cert. denied,* 398 U.S. 905 (1970).

Therefore, the judgment entered below should be affirmed unless it was an abuse of discretion for the District Court to find that the defendant's failure to comply with the Court's discovery orders was due to wilfulness, bad faith or fault, rather than to an inability to comply. *Societe Internationale* v. *Rogers,* 357 U.S. 197, 212 (1958); *Flaks* v. *Koegel, supra* at 709. The facts in this case strongly support that finding.

A. The Judgment Was Justified Based Upon Defendant's Wilful Failure to Appear for Its Deposition By Pedro Fullana, Its Executive Vice-President.

At the hearing on January 21, 1976 and in the judgment entered the following day, the District Court found that the

defendant's failure to appear for its deposition by Pedro Fullana, its executive vice-president, was wilful. (JA 228-29, 231, 232-33, 239) That deposition, originally noticed on September 25, 1973 for November 1, 1973, was rescheduled by court order for April 17, 1974, after the defendant's attorneys submitted an affidavit in opposition to plaintiff's first motion for sanctions stating that they had "no objection to the Court fixing dates for the depositions of its officers, directors and/or managing agents at the very end of January or any time thereafter." (JA 40-41; *see* p. 11 *supra*) Yet, nearly seven months after service of the notice of deposition and only five days before the rescheduled date, defendant moved for an order transferring the deposition to Puerto Rico.

The timing of the motion to change the location of the deposition can be viewed only as an effort to delay and, of itself, may be viewed as wilful. *See Trans World Airlines, Inc.* v. *Hughes*, 32 F.R.D. 604, 607 (S.D.N.Y. 1963), *aff'd*, 332 F.2d 602 (2d Cir. 1964), *rev'd on other grounds*, 409 U.S. 363 (1973); *cf. Patterson* v. *C.I.T. Corporation*, 352 F.2d 333, 336 (10th Cir. 1965).

After the motion was denied, the deposition was to have taken place on April 23, 1975, but on the previous day plaintiff was informed that Fullana would not appear for his deposition and subsequent efforts by plaintiff to reschedule the deposition were unsuccessful. (JA 150) The District Court has since issued its order of October 3, 1975, including a pre-trial schedule and a deadline for completion of discovery. (JA 179-83) Defendant has ignored that order as well as the more than two-year old outstanding notice of deposition and the prior orders of the District Court, and the deposition has never been held.

Other than the motion to transfer, the defendant has never sought a protective order with respect to the deposi-

tion of Fullana and, of course, the defendant's attorneys have long recognized the right of plaintiff to take the deposition. (JA 40-42) Even after the Berger and Cohen depositions, the defendant did not question the propriety of the Fullana deposition, but only its location. Therefore, it is surprising that the defendant, now for the first time in its brief, argues that the deposition would be "repetitious, burdensome and unnecessary" and that "[n]o showing can realistically be made that it was 'essential' to this litigation." (DB 10, 19)

Objections not made in the trial court are waived, and the defendant cannot now be heard to offer these objections to excuse its noncompliance with the notice of deposition and the Court's orders. *Flaks* v. *Koegel, supra* at 710; *Diapulse Corporation of America* v. *Curtis Publishing Co., supra* at 445; *Collins* v. *Wayland,* 139 F.2d 677 (9th Cir.), *cert. denied,* 332 U.S. 744 (1944).

Professor Rosenberg's warning against allowing a contumacious party the opportunity to challenge a Rule 37 motion by attacking the discovery sought is even more apropos to such an attack made for the first time at the appellate level:

> "Another practice that erodes discovery sanctions is the courts' habit of allowing the recusant party to transform a motion for relief under rule 37 into a challenge of the propriety of the discovery proceeding for which enforcement is sought. In the view of many courts the only permissive procedure for challenge is to seek relief *before* default by 'motion seasonably made' under rule 30. . . . Rule 30 will surely be undermined and the whole discovery apparatus thrown out of gear if a recalcitrant party may ignore the design of the rules and open up his default when the examining party seeks to enforce penalties.
>
> The confusion that exists in this area is largely the courts' own creation. They should speedily undo it

> by enforcing the rules as they are written. Attacks upon the propriety of discovery proceedings should be timely under rule 30 and should not be entertained after a default. Such irregular dilutions of the force of rule 37 take their toll. Rules, no matter how well conceived, will not enforce themselves. They will work only if judges confronted with the task have unwavering determination to make them work." Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Colum. L. Rev. 480, 496 (1958) (emphasis in original).

In *Flaks* v. *Koegel, supra*, rejecting the appellants' claim that the trial court failed to find that the unanswered interrogatories were in fact material, this Court stated:

> "We consider the materiality question to be frivolous. The posture of the defendants has continually been, not that the interrogatories were irrelevant, but either that counsel had been supplied with the information necessary to answer them, or that more time was needed to respond. . . . The argument was not strongly urged below and on appeal it is gossamer." 504 F.2d at 710.

Assuming, however, that defendant could properly raise objections to the deposition at this time, the record certainly does not support the assertions that the Fullana deposition would have been repetitious or that it was not essential. The importance of the Fullana deposition is amply demonstrated by the deposition testimony of both parties concerning Fullana's role in the business operations and financing transactions of the defendant and by Cohen's and Berger's denials of knowledge in certain key areas. (*See* pp. 13-15 *supra*)

Moreover, as shown above and in Section IC of this brief, the defendant has not demonstrated that it was unable for good cause to appear at its deposition. It is clear from the

record that Fullana made relatively frequent trips between Puerto Rico and New York, including trips for the purpose of this action such as the one on February 3, 1976 to execute the affidavit for substitution of counsel. (JA 244-45; EV 268) The defendant never obtained a court order postponing or excusing Fullana's duty to appear, even during the time that the motion to transfer the location of the deposition was pending. Rather, it disobeyed the District Court's order to appear on April 17, 1974 for its deposition by Fullana, successfully blocked the plaintiff's efforts to reschedule the deposition in April 1975, and simply ignored the District Court's pretrial order requiring completion of discovery by December 1, 1975, which placed the burden upon the defendant to appear and permit the plaintiff to complete its discovery pursuant to outstanding discovery notices. *Marriott Homes, Inc.* v. *Hanson*, 50 F.R.D. 396, 400 (W.D. Mo. 1970). The record amply supports a finding that Fullana wilfully failed to appear for his deposition for more than two years and it was not an abuse of discretion for the District Court to grant the motion for a default judgment on that basis.

B. The Judgment Was Justified Based Upon Defendant's Wilful Failure to Produce Documents or Affidavits in Lieu Thereof.

The District Court also based its order directing entry of a default judgment upon the defendant's wilful failure to produce documents or, in lieu thereof, affidavits attesting to the nonexistence of such documents.

The plaintiff requested documents of the type a corporation in defendant's position would normally be expected to generate and retain. Records normally kept in the business of a corporation, which can be established by the nature of the documents themselves, are presumed to exist and, upon

a prima facie showing of control by a party, a court order compelling their production is justified. *Norman* v. *Young*, 422 F.2d 470, 473 (10th Cir. 1970).

A corporation such as the defendant—in the construction industry, in need of millions of dollars of financing, and with its three principals in New York, Puerto Rico and Spain—is reasonably expected to have correspondence and minutes of its board of directors' meetings concerning that financing and its contacts with brokers, especially where a broker eventually secured the financing. Furthermore, such documents as exist, or copies of such documents, would certainly be in the possession of the defendant.

In this case, the defendant has never overcome the presumption that the requested documents exist and are under its control. In fact, the defendant has demonstrated that it has failed, without any reason therefor, to make any effort even to search for the documents. At his deposition on February 28, 1974, Cohen testified that Fullana's files had not yet been searched (EV 12); on March 5, 1974, it was revealed that Berger had not yet searched his own files. (EV 258-59)

After Cohen, the president of the defendant, denied at his deposition knowledge of whether an agreement was ever signed between the defendant and Otero, the broker who arranged the HIC loan, or whether the defendant ever executed a formal loan application for HIC, he was asked to search the defendant's files for these documents, as well as for further documents of his own and for relevant minutes of board of directors' meetings. (EV 12-14, 81-84, 94-97) No further documents were produced, and it was under these circumstances that plaintiff made its repeated requests for compliance with its notice of document production.

Thereafter, Magistrate Schreiber also refused to believe that the requested documents do not exist and, in his November 11, 1974 order, found noncompliance with the District Court's March 5, 1974 order and required the defendant to comply by December 15, 1974 with that order and with plaintiff's requests made during the depositions. (JA 125-26)

After the November 11, 1974 order, the defendant produced only Cohen's travel and telephone records and, on December 18, 1974, Magistrate Schreiber directed it to produce affidavits indicating that it had fully complied with document production. (JA 192) Neither the additional documents nor the affidavits were ever produced.

Accordingly, in view of Magistrate Schreiber's recommendation as early as November 11, 1974 for entry of a default judgment, the District Court was entirely justified in entering a default judgment in January 1976 after the defendant had neither produced documents nor offered a credible explanation of its failure to do so during the more than one year that had passed since the November 11, 1974 order and the nearly two-year period since the Court's original March 5, 1974 order.

In any event, the default rested not only upon the defendant's failure to produce documents in compliance with the orders of March 5, 1974 and November 11, 1974, but also upon its failure to produce affidavits pursuant to Magistrate Schreiber's oral order of December 18, 1974. Production of affidavits in lieu of documents is a recognized procedure for assuring that a party has, in fact, produced all the documents requested. *Norman* v. *Young, supra; Fisher* v. *Harris, Upham & Co.*, 61 F.R.D. 447, 452 (S.D.N.Y. 1973), *appeal dismissed*, 516 F.2d 896 (2d Cir. 1975); *Budget Rent-A-Car* v. *Hertz Corporation*, 55 F.R.D. 354, 357 (W.D. Mo. 1972).

In *Norman* v. *Young, supra,* a case strikingly similar to this one procedurally, the Tenth Circuit Court of Appeals affirmed a default judgment against defendants who failed to produce documents or affidavits in lieu thereof. Plaintiff, a stockbroker, had sued two defendants for payment of securities purchased on their behalf. Plaintiff sought the defendants' income tax returns, bank statements and other documents reflecting their ability to pay their debt, most of which were not produced even after a court order compelling production was obtained. In affirming the entry of the default judgment, the court of appeals stated:

> "[R]ecords which are normally kept in the business of the party, as these were, are presumed to exist, absent a sworn denial, and a prima facie case of control is all that must be established to justify issuance of the order. By the nature of the documents requested, plaintiff provided a prima facie case of existence and control by the motion for production. Oral excuses were legion but never did defendants deny in writing (until after default) that the documents existed. Having failed to properly deny that which was presumed to exist, defendants failed to establish their inability to comply with the order. And, thereby, the Court could presume existence in a concealed state and/or that the evidence they would provide would show the untruth or unmeritorious nature of the defense." 422 F.2d at 473.

In this case, for more than thirteen months—from December 18, 1974 until entry of judgment and, indeed, even afterwards—the defendant's officers have refused to swear that the requested documents do not exist. Since the defendant was directed well over one year ago to produce affidavits, the location of its principals, wherever they

might be, offers no excuse for defendant's failure, and the assertion that the Court's January 12, 1976 order "deflected" the defendant from production of the affidavits is a hollow one. (DB 14) The presence of Berger and Cohen in New York and Fullana's trips to New York make defendant's failure, even after entry of judgment, impossible to explain; not surprisingly, the defendant makes no effort to do so. The total failure to produce affidavits or offer an excuse for their absence also prohibits any meaningful comparison of this case to *Flaks* v. *Koegel, supra,* upon which the defendant relies but in which both the defendant and his former attorney submitted affidavits which explained the prior failure to produce documents and created material issues of fact requiring an evidentiary hearing.

As the court stated in *Norman* v. *Young, supra,* under circumstances less exigent than the present, where the defendants were only two months in default in producing affidavits:

> "It is mirrored in the record that the [defendants'] failure to produce the requested papers was willful. It was more than intentional; it was a direct flaunting of the Court's authority. The entry of default judgment was not vindictive but was compelled by defendant's conduct in order to protect the statutorily-created right of discovery and the constitutionally-guarded due process rights of plaintiff." 422 F.2d at 474.

See DiGregorio v. *First Rediscount Corporation, supra.*

The District Court's entry of a default judgment based upon the defendant's failure to produce the requested documents or affidavits was justified by the entire record in this case.

C. Defendant's Attempts to Excuse the Default Are Without Merit.

1. *Insofar As the Underlying Merits Are Relevant, the Deferdant Has Not Shown That They Require Reversal of the Judgment Entered Below.*

Rather than offer a reason for its noncompliance, the defendant raises collateral issues. For example, the defendant asks the Court to examine the "totality of circumstances", including the "dubious merit of plaintiff's claim, taken in conjunction with defendant's presumptively valid counterclaims." (DB 16) Apparently, the defendant believes that a meritorious claim, assuming one exists, permits a party to refuse to permit discovery and to ignore court orders compelling discovery.

In *Trans World Airlines, Inc.* v. *Hughes,* 449 F.2d 51 (2nd Cir. 1971), *rev'd on other grounds,* 409 U.S. 363 (1973), however, where the defendant, after suffering entry of a default judgment against it, tried to avoid liability at the hearing on damages by challenging the validity of plaintiff's claim, this Court rejected such a theory:

> "It would usher in a new era in the dynamics of litigation if a party could suffer a default judgment to be entered against it and then go about its business as if the judgment did not exist and as though, despite the opportunities to comply with the court's orders and to defend on the merits which had been ignored, the slate was wiped clean and a new day had dawned. To state the proposition is to expose the folly of it." 449 F.2d at 63-64.

In any event, the footnote in defendant's brief devoted to the subject is hardly enough to justify the assertion that plaintiff's claim is legally without merit. (DB 16) The parties agreed that the contract would be construed and governed by the laws of New York. (JA 9) In New York,

a principal who has a contract with a broker acting in the capacity of an exclusive agent can escape liability for a commission fee only if he acts in good faith on his own behalf, without the aid of another broker and without consummating a deal with a lender secured by the agent. *See Levy* v. *Isaacs,* 285 App. Div. 1170, 140 N.Y.S.2d 519 (2d Dep't), *modified,* 286 App. Div. 855, 143 N.Y.S.2d 642 (2d Dep't 1955); *Slattery* v. *Cothran,* 210 App. Div. 581, 206 N.Y.S. 576 (4th Dep't 1924); *Character and Extent of Right of Broker Who Has Exclusive Contract, Where Sale Is Effected Without His Agency,* 64 A.L.R. 395, 404 (1929). In this case, the plaintiff's contact with HIC may have been a factor in the defendant's ultimate financing by HIC. Nonetheless, even if the plaintiff's contact with HIC would not entitle it to its commission, the defendant has testified that it secured the HIC loan by using another broker, Otero (JA 57, EV 93-95), while not having terminated its exclusive contract with the plaintiff and, on that basis, plaintiff's claim for a commission is meritorious.

In addition, a broker is entitled to a commission if a transaction has not been consummated due to the fault of the principal. *Mosberg* v. *Goldberg,* 117 N.Y.S.2d 568 (Sup. Ct. N. Y. Co. 1952); *see Right of Mortgage Broker to Commission Where Principal Violated Conditions of Agreement,* 45 A.L.R.3d 1326 (1972). The delay that was created by defendant's inability to supply guarantors during the course of the negotiations and its failure to supply adequate marketing and sales data right through the end of September 1972 may have been the real reason FMI decided not to complete the loan with the defendant and, if so, the plaintiff would be entitled to its commission.

Finally, under New York law, the employment of a broker as an exclusive agent for a specified period of time, including an extension provision similar to the one present in the instant case, gives the broker the exclusive right to sell.

Blank v. *Longenberger*, 132 Misc. 374, 229 N.Y.S. 97 (Buffalo City Ct.), *rev'd on other grounds*, 133 Misc. 32, 231 N.Y.S. 79 (Sup. Ct. Erie Co. 1928); *see Bainet* v. *Cannizzaro*, 3 App. Div. 2d 745, 160 N.Y.S.2d 329 (2d Dep't 1957); *Bagley* v. *Butler*, 59 Misc. 2d 1029, 301 N.Y.S.2d 148 (Rensselaer Co. Ct. 1969). Thus, if it is proved that the principal acted on his own behalf, even without another broker, he would be liable to the agent for a commission fee.

Furthermore, the defendant's bald assertion at this time that its counterclaims are "presumptively valid" is directly contrary to the actual situation. In fact, by its default, the defendant has admitted every well-pleaded allegation in the plaintiff's complaint and reply to the counterclaims. *E.g.*, *Hammond Packing Company* v. *Arkansas*, 212 U.S. 322 (1909); *Trans World Airlines, Inc.* v. *Hughes*, 449 F.2d 51, 63 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973). In *Hammond Packing Company* v. *Arkansas*, *supra*, the Supreme Court affirmed the lower court's action in striking the answer and rendering a default judgment against the defendant for its failure to permit discovery:

> "[T]he refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." 212 U.S. at 351.

2. *The Events Which Occurred After December 1, 1975 Do Not Justify the Defendant's Prior Conduct and Do Not Require Reversal of the Judgment Entered Below.*

Defendant also argues that the District Court should not have granted plaintiff's motion because of certain events that occurred after the December 1, 1975 conference with Magistrate Schreiber. The defendant alleges that Fullana appeared in its attorney's office on January 13, 1976 to prepare for his deposition the next day, pursuant to Magis-

trate Schreiber's recommended order. That appearance, if it did occur, would still not have cured the defendant's twenty-six month default in appearing for its deposition by Fullana. Belated efforts or offers to comply with discovery requests or court orders without a justifiable excuse for prior noncompliance do not excuse or cure the default, especially where the record is replete with evidence of bad faith or wilful neglect. *Norman* v. *Young, supra* at 473; *United States* v. *Continental Casualty Company,* 303 F.2d 91 (4th Cir. 1962); *Charron* v. *Meaux,* 66 F.R.D. 64, 68 (S.D.N.Y. 1975); *Bollard* v. *Volkswagen of America, Inc.,* 56 F.R.D. 569, 585-86 (W.D. Mo. 1971); *see Theodoropoulos* v. *Thompson-Starrett Company, supra* at 352. And whatever the effect might have been of that appearance with respect to the default in the deposition proceedings, it certainly would not have cured the default in production of documents or affidavits.

Defendant makes the unfounded assertion that:

> "Additionally, assuming the District Court's overruling of the Pre-Trial Magistrate's discovery order would normally be within its discretion, in this instance it pressed the parties into a breach of their prior express, voluntary stipulation to refer *all* discovery questions to the Pre-Trial Magistrate. Moreover, the procedure followed by the District Court in its unexpected rejection of the Magistrate's order, left defendant with no adequate warning of, nor opportunity to correct, the alleged default." (DB 17) (emphasis in original)

The stipulation to which the defendant refers was, in fact, the District Court's March 5, 1974 order which provided that "[a]ll future pre-trial discovery proceedings shall be referred to Magistrate Sol Schreiber for supervision." (Supplementary Appendix) That provision was ordered pursuant to the jurisdictional statute for magistrates,

which allows the district courts to authorize a magistrate to assist a district judge "in the conduct of pretrial or discovery proceedings in civil or criminal actions." 28 U.S.C.A. § 636(b)(2) (Supp. 1976). It is quite clear that a magistrate acts under the supervision of a district judge "and that authority for making final decisions remains at all times with the district judge." *Mathews* v. *Weber,* 96 S. Ct. 549, 554 (1976); *see O'Shea* v. *United States,* 491 F.2d 774 (1st Cir. 1974); *TPO, Incorporated* v. *McMillen,* 460 F.2d 348 (7th Cir. 1972). Thus, notwithstanding the recommendation of Magistrate Schreiber, in the case of a sanction as serious as a default judgment, the District Court was permitted, indeed expected and required, to consider that recommendation with the other evidence before it and reach its own decision.

The defendant's claim that it was left with neither "adequate warning of, nor opportunity to correct, the alleged default" is equally baseless. (DB 17) It is difficult to imagine a party having more warning than the defendant did that the Court would no longer tolerate its wilful disobedience of the Court's orders and that it was subject to imposition of the most severe sanctions permitted by the Federal Rules of Civil Procedure. Since the District Court's March 5, 1974 order, the result of the plaintiff's first motion for sanctions on December 13, 1973, the defendant has been aware that it was required to produce documents and appear for its deposition by Fullana. Thereafter, the defendant was the subject of the District Court's orders of November 11, 1974; December 18, 1974; March 31, 1975; and October 3, 1975.

In *Link* v. *Wabash Railroad Co.,* 370 U.S. 626 (1962), the Supreme Court affirmed the district court's order dismissing an action pursuant to Fed. R. Civ. P. 41(b) without any advance notice or hearing, finding that the order had not

offended due process. The Court's language is equally applicable to the Rule 37 situation:

> "The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. The circumstances here were such as to dispense with the necessity for advance notice and hearing." 370 U.S. at 632.

Similarly, in *Diapulse Corporation of America* v. *Curtis Publishing Company, supra,* a comparable situation existed where this Court affirmed a dismissal pursuant to Rule 37(b) for failure to comply with a discovery order for the production of documents, and it was stated:

> "By the time the matter came before the judge, *plaintiff may have hoped for nonenforcement of the rules and one more opportunity to relitigate the matters decided by Judge Herlands. However, surprise engendered by a court's adherence to the rules is not a good ground for appeal.* Judge Murphy's decision to dismiss the complaint was not precipitate; it was made almost two weeks after argument of the motion, and thereafter the judge granted plaintiff's motion to reargue and reaffirmed his original order. There is no issue of importance raised now that was not considered by one or both of these district judges." 374 F.2d at 446-47 (emphasis added).

And in *Jones* v. *Uris Sales Corporation, supra,* this Court rejected the defense of surprise and affirmed a default judgment for almost $100,000. In *Jones,* after the defendant had appeared on varous occasions for his disposition without bringing documents, the court ordered him to return with documents within 24 hours or else the court would appoint a special master to preside over the depositions at

defendant's expense. When the defendant returned with some, but not all, the documents, the court granted the motion to strike the answer and, subsequently, granted judgment by default. This Court affirmed, stating:

> "Contempt and a striking of the answer had long been in the background; [the defendant] could not safely assume that the only consequence of contumacy would be the sanction the judge had outlined the previous day." 373 F.2d at 648.

See Teamsters Local 251 v. *Town Line Sand & Gravel, Inc.*, *supra; Theodoropoulos* v. *Thompson-Starrett Company*, *supra* at 354.

3. *The Gill v. Stolow and Flaks v. Koegel Decisions of This Court Do Not Support the Defendant's Contention That the Sanction of Default Was Too Severe.*

Only in its reference to the *Gill* v. *Stolow* and *Flaks* v. *Koegel* decisions of this Court does the defendant even purport to justify its noncompliance with the District Court's discovery orders. Those cases, however, are quite different from the situation presently before the Court. In *Gill* v. *Stolow*, 240 F.2d 669 (2d Cir. 1957), this Court reversed a default judgment upon a strong showing by the defendant that he could not have appeared for his deposition, thereby negating any finding of wilfulness. No such circumstances exist in the present case.

In *Flaks* v. *Koegel*, 504 F.2d 702 (2d Cir. 1974), to which defendant refers to support its allegation of attorney-client difficulties, the defendants' counsel's motion to withdraw was granted prior to entry of the default, thereby leaving defendants without counsel familiar with the action and temporarily financially unable to retain new counsel. After the individual defendant did retain new counsel, he sub-

mitted an affidavit in which he swore that previous counsel had been provided sufficient information to respond to plaintiffs' interrogatories; that previous counsel had asserted an attorney's lien on his records; that he had never been notified to appear on any adjourned dates for his deposition nor had he received a letter from the court; and that he had difficulty in retaining new counsel because the attorneys he contacted were discouraged by his prior counsel. Significantly, the defendant's former counsel submitted an affidavit as *amicus curiae*, admitting in part the defendant's allegations and attesting that the defendant tried in good faith to comply with the discovery notices and court orders.

Upon that record, this Court stated that the affidavits created material issues of fact and that the District Court had committed an abuse of discretion in entering a default judgment. Even then, this Court only remanded for an evidentiary hearing on wilfulness, stating:

> "The affidavits then before the court depicted Koegel as a victim of the neglect of disaffected counsel, unaware of the crucial orders we have recounted, ready and able to comply and also seeking an evidentiary hearing to establish his bona fides. *If counsel rather than the client were at fault and if serious efforts to obtain new counsel had been made under the handicaps described, then the order entering the default judgment was an abuse of discretion.*" 504 F.2d at 712 (emphasis added).

The situation in *Flaks* is strikingly different from the one now before this Court. The defendant has never been without diligent counsel, as evidenced by its previous counsel's efforts to have the District Court's order reconsidered. There is no evidence, and defendant has never contended, that it was without notice of any aspect of the proceedings in the District Court. When the defendant did request a

hearing, at which the District Court found it had acted wilfully and without justifiable excuse, no one appeared on behalf of the defendant except its lawyer, although Cohen and Berger are both New York residents and Fullana had been in New York just the previous week and he returned again by February 3, 1976 to execute his affidavit for substitution of counsel. The only affidavit submitted at the hearing was that of the defendant's attorney, who recited only the events that occurred since the December 1, 1975 conference with Magistrate Schreiber. Moreover, he objected only to the District Court's rejection of the Magistrate's recommendation, again, without offering any excuse for the defendant's recalcitrance in supplying documents or affidavits or for its failure to appear for its deposition. (JA 196-202)

4. *Defendant's Recalcitrance Cannot Be Attributed to Its Attorneys.*

Defendant's allusion to "the unexplained difficulties between defendant and its then attorneys" is also unwarranted by the record. (DB 20) Defendant cites, for the first time, "difficulties in communication between New York counsel and a foreign witness" as a mitigating factor for this Court's consideration. (DB 19) Here defendant is apparently claiming that some lack of understanding existed between the defendant and its attorneys. The record, however, does not support this claim, and rather shows that if there was any such failure it was due to defendant's wilful disregard of its duty to submit to discovery.

POINT II

The District Court Correctly Denied Defendant's Motion for a Protective Order Transferring the Fullana Deposition to Puerto Rico.

The location of a deposition is solely within the discretion of the District Court. *Baker* v. *Standard Industries, Inc.,* 55 F.R.D. 178 (D.P.R. 1972); *Tomingas* v. *Douglas Aircraft Co.,* 45 F.R.D. 94 (S.D.N.Y. 1968); *Society of Independent Motion Picture Producers* v. *United Detroit Theatres Corporation,* 8 F.R.D. 453 (E.D. Mich. 1948).

Assuming *arguendo* that it was error for the District Court to deny the motion to transfer the Fullana deposition, that error would not justify Fullana's failure to appear in New York for his deposition pursuant to the Court's order and would not require reversal of the judgment below. In the case of such error, the proper course of action would have been for the defendant to appear for the deposition and, in a later appeal from a judgment, seek reimbursement for the expenses incurred.

Moreover, the principle cited by the defendant that the deposition of a corporate officer should be taken at the corporation's principal place of business is not one applied blindly by the courts. As the court stated in *Society of Independent Motion Picture Producers* v. *United Detroit Theatres Corporation, supra:*

> "This rule, however, is no more inflexible than is the rule that depositions of plaintiffs choosing a certain forum should be taken there . . . . Each situation must be examined and decided in the light of its own peculiar facts and circumstances." 8 F.R.D. at 455.

The court then balanced a number of factors presented in the parties' affidavits, including the relative burden to the

deponents and the attorneys of depositions in either Los Angeles or Detroit and the frequency with which the deponents traveled to the forum, and denied the motion to transfer the deposition.

Without any valid reason offered for a change in the location of a deposition, the Court should not require that the location be changed. Furthermore, in considering a motion for a protective order concerning a deposition, the Court is not limited solely to consideration of the convenience of the deponent. For example, in *Producers Releasing Corporation De Cuba* v. *PRC Pictures, Inc.,* 176 F.2d 93 (2d Cir. 1949), this Court found it had not been an abuse of discretion to require the president of the corporate plaintiff to travel from the corporation's headquarters and his residence in Cuba to New York for his deposition, not withstanding the president's submission of doctors' affidavits which the Court received skeptically. In this case, no affidavit by Fullana himself was filed in the Court below and, therefore, it was impossible for the Court to measure the burden a deposition in New York would have placed upon Fullana. In fact, aside from a portion of its memorandum of law, the only references to the motion to transfer the deposition were in the defendant's notice of motion itself and one sentence in Mr. Horowitz's affidavit which gave no reason for a transfer. (JA 47, 53)

Under these circumstances, it was not an abuse of discretion for the Court to deny the defendant's motion on the grounds that the defendant had not alleged that Fullana's absence from Puerto Rico would harm its business and that greater economy would result from Fullana's traveling to New York, rather than the lawyers' traveling to Puerto Rico. (JA 131) *Terry* v. *Modern Woodmen of America,* 57 F.R.D. 141 (W.D. Mo. 1972); *Tomingas* v. *Douglas Aircraft Co., supra.*

Finally, the timing of the defendant's motion must be noted. The deposition was first noticed for November 1, 1973; the date was later changed by the District Court's March 5, 1974 order to April 17, 1974. The motion to change the location, which was served on April 12, 1974, was not seasonably made and could have been denied on that basis alone. *Baker* v. *Standard Industries, Inc., supra; Dictograph Products, Inc.* v. *Kentworth Corporation,* 7 F.R.D. 543 (W.D. Ky. 1947).

Conclusion

For the reasons stated above, the judgment of the District Court should be affirmed.

June 3, 1976

Respectfully submitted,

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Of Counsel:

JUDSON A. PARSONS, JR.
BOB D. MANNIS

SUPPLEMENTARY APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2[illegible] (CBM)

STIPULATION

It is hereby stipulated and agreed by and between the undersigned counsel for the parties to this action that:

1. All future pre-trial discovery proceedings shall be referred to Magistrate Sol Schreiber for supervision.

2. The pending motion of plaintiff to compel discovery or impose sanctions is resolved as follows:

a. The documents whose production was sought by plaintiff's pending request for production of documents shall be produced on or before February 26, 1974 at a place to be agreed upon by counsel;

b. The oral examinations pursuant to Federal Rule of Civil Procedure 30 of Messrs. Cohen and Berger will be taken at the offices of counsel for plaintiff on February 28, 1974 at 10:00 a.m., and on March 5, 1974 at 9:30 a.m., respectively; and

c. The oral examination pursuant to Federal Rule of Civil Procedure 30 of Mr. Fullana is deferred ~~pending~~ until April 17, 1974

dism

Dated: New York, New York
February 22, 1974

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD

By _____
A Member of the Firm

Attorneys for Plaintiff
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[illegible]

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[illegible]
[illegible]
[illegible]
Tel. No. (212) [illegible]

SO ORDERED: February 26, 1974

(Constance Baker Motley)
U.S.D.J.

RG

73 Civ. 2422 (CBM)
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

- against -

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

NOTICE OF CROSS-MOTION AND AFFIDAVIT

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
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BOROUGH OF MANHATTAN
NEW YORK, N. Y. 10005
TELEPHONE 212 344-8000

FILED
8 1975

JAN 12 1976
S. D. OF N. Y.

COPY RECEIVED
THIS _____ DAY OF _____ 19__
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The court rejects the proposed order proposed by Magistrate Schreiber on December 9, 1975 and grants the plaintiffs motions for sanctions against defendants for their refusal to comply with the provisions of this court to produce certain documents and to appear for the taking of defendant's deposition. A judgment of default will be entered against defendants as provided by Rule 37, F. R. Civ. P. Plaintiffs are directed to promptly submit an order.

So Ordered

Constance Baker Motley
U. S. D. J.

N. Y. N. Y.